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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

WAYNE EDWARD GIVEHAND,

Defendant and Appellant.

B207058

(Los Angeles County  
Super. Ct. No. BA330334)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,  
Stephen A. Marcus, Judge. Affirmed.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C.  
Johnson, Supervising Deputy Attorney General, Carl N. Henry, Deputy Attorney  
General, for Plaintiff and Respondent.

## **INTRODUCTION**

A jury convicted defendant and appellant Wayne Givehand (defendant) of second degree robbery. (Pen. Code, § 211<sup>1</sup>.) The trial court sentenced defendant to three years in state prison. On appeal, defendant contends that insufficient evidence supports his conviction and that the trial court erred in instructing the jury with CALJIC No. 2.11.5. We affirm.

## **BACKGROUND**

Juan Rivera Nolasco (Nolasco) sold clothes on the street in Los Angeles. Nolasco's brother, Julio Rivera (Rivera), occasionally helped Nolasco sell clothes. Between 6:00 and 7:30 p.m., on October 4, 2007, Nolasco received a phone call from a man who inquired about the purchase of pants. The caller's telephone number was displayed on Nolasco's cell phone. The man asked Nolasco to meet him at 78th Street and Figueroa and to bring all of a certain type of pants that Nolasco had. Nolasco agreed, and called Rivera to assist him.

Nolasco and Rivera drove to 78th Street and Figueroa in separate cars. Once there, Nolasco called the man with whom he had arranged the meeting. That man, whom Nolasco identified as defendant at trial, approached Nolasco and directed him to a nearby location. At the second location, Rivera double-parked about two car lengths in front of Nolasco. Two men walked up to Rivera's car. A third man stood on the sidewalk smoking a cigarette. Rivera got out and opened the back of his car. The "client" inspected the pants. One of the men selected pairs of pants he liked and placed them over his shoulder. One of the men said he had to leave to get money. That man returned and pointed a gun at Rivera. The man asked, "How much?" When Rivera responded, the man said, "I have this. Go, or I'm going to shoot you." Before Rivera left, the man took

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise noted.

money from Rivera's pocket. The men also took 15 pairs of jeans, and an amplifier from Rivera's car. Nolasco remained in his car. Nolasco saw only two persons involved in the robbery of his brother.

Nolasco contacted a nearby police patrol car. Nolasco showed the police his cell phone and the number "from where they had been calling me about what happened on that day." Los Angeles Police Department Detective Dean Vinluan obtained a cell phone number from the police report. Detective Vinluan contacted Sprint-Nextel, the cell phone's provider, and obtained "information with respect to the location of the cell phone with that cell phone number."

On October 10, 2007, Detective Vinluan and other police officers searched defendant's mother's house at 706 West 77th Street. Because the officers were looking for a cell phone as part of their investigation, Officer Michael Martinez asked Detective Vinluan to call the number associated with that cell phone. When Detective Vinluan called the number, Officer Martinez heard a cell phone ring in the back of the house. Officer Martinez investigated and determined that defendant was in a back bedroom and that he had possession of the cell phone. In the closet of that bedroom, Officer Martinez found a handgun and a pair of jeans with a price tag on them of the type Nolasco sold on October 4, 2007.

Police officers detained defendant, Derraille Cail<sup>2</sup>, and four other men outside of the house at 706 West 77th Street. A police officer took Rivera to that location for a field show up. Rivera identified Cail as one of the robbers. Rivera did not identify defendant as one of the robbers. During the field show up, Dabreion Hardy<sup>3</sup> was detained. After Rivera was shown the six other men, he was shown Hardy. Rivera identified Hardy as

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<sup>2</sup> Cail was named as a defendant and tried with defendant in this action. During trial, Cail accepted an offer to plead no contest to the second degree robbery of Rivera.

<sup>3</sup> It appears that Hardy's involvement in the robbery was addressed in a juvenile proceeding.

another of the robbers. Hardy subsequently admitted to Detective Vinluan that he, “Wayne,” and “Ray-Ray” committed the robbery. At trial, Rivera was unable to identify anyone in the courtroom as one of the robbers. Nolasco also was taken to 706 West 77th Street for a field show up. Nolasco identified defendant as one of the robbers.

Defendant testified in his own behalf and denied that he met with Nolasco or that he robbed Rivera. Defendant stated that he attended a meeting at the Black Silk Club on October 4 that began at 6:30 p.m. and that he remained at the club after the meeting until 1:00 a.m. Defendant stated that he loaned his cell phone to Hardy on October 4, and that Hardy returned the cell phone on October 5. Defendant further stated that he purchased the jeans found in his closet on October 5. Defendant’s mother and others who worked at the Black Silk Club testified that defendant was in their presence either traveling to or at the club from 6:00 p.m. on October 4, 2007, to 1:00 a.m.

Hardy, who was in custody at juvenile hall, testified that he and Ray-Ray robbed Rivera. Hardy personally used the gun. Hardy testified that he borrowed defendant’s cell phone the day of the robbery, used the phone to arrange the meeting on 78th Street, and returned the phone the next day. Hardy testified that defendant, with whom he was friends, was not with him when he robbed Rivera. Although somewhat unclear, Hardy appears to have testified that he pleaded guilty in a juvenile court proceeding to robbing Rivera and was sentenced to juvenile camp for six months. Hardy did not remember telling a detective that “Wayne” participated in the robbery.

Called in rebuttal, Los Angeles Police Department Sergeant Paul Rodriguez testified that defendant’s mother was present when defendant was arrested and did not tell the officer that defendant was with her at the Black Silk Club during the evening of October 4. Also called in rebuttal, Detective Vinluan testified that defendant told him that he was working at the post office from 7:30 p.m. on October 4, 2007, to 6:00 a.m. the next morning. Defendant did not mention the Black Silk Club. In his testimony, defendant had denied that he told the officer that he was working at the post office on October 4, 2007. Defendant stated that he told the officer that he had worked at the post office on different dates.

## DISCUSSION

### I. Sufficient Evidence Supports Defendant's Robbery Conviction

Defendant contends that there was insufficient evidence to convict him of second degree robbery under section 211 because the evidence was inadequate to prove he was one of the “two” men to have robbed Rivera. Defendant asserts that Cail and Hardy were the only two men Rivera identified as being the men who robbed him; Nolasco only saw the events from afar, his vision was blocked, and it was dark; and although Nolasco identified defendant as being one of the robbers, his testimony had inconsistencies.

#### A. *Standard of Review*

“In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ([*People v.*] *Rowland* [(1992)] 4 Cal.4th [238,] 269, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) We apply an identical standard under the California Constitution. (*Ibid.*) ‘In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court “must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”’ (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738].)” (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

“In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Young, supra*, 34 Cal.4th at p. 1181; *People v. Boyer* (2006) 38 Cal.4th 412, 480

[“Identification of the defendant by a single eyewitness may be sufficient to prove the defendant’s identity as the perpetrator of a crime”].)

*B. Application of Relevant Legal Principles*

Sufficient evidence supports defendant’s conviction of second degree robbery. Although Nolasco testified that he saw only two men rob his brother, the evidence supports the jury’s implicit determination that three men committed the robbery and its determination that defendant was one of the perpetrators. Nolasco identified defendant at a field show up and at trial as the person with whom he spoke on the phone and who directed him from 78th Street and Figueroa to the site of the robbery. Hardy told Detective Vinluan that “Wayne” participated in the robbery with him and “Ray-Ray.” The number for the cell phone that the robbers used to contact Nolasco was for defendant’s cell phone. Six days after the robbery, defendant was found in possession of the cell phone that the robbers used to contact Nolasco, a pair of jeans of the type Nolasco sold on the day of the robbery, and a handgun. Defendant told Detective Vinluan that he was working at the post office when the robbery took place. At trial, defendant changed his alibi and testified that he was at the Black Silk Club. Based on this evidence, a reasonable juror could have found defendant guilty of second degree robbery beyond a reasonable doubt. (*People v. Young, supra*, 34 Cal.4th at p. 1175.) Any conflicts in the evidence were for the jury to resolve. (*Id.* at p. 1181.)

**II. The Trial Court Properly Instructed The Jury With CALJIC No. 2.11.5**

Defendant contends that the trial court erred in instructing the jury with CALJIC No. 2.11.5 because the instruction had the effect of impeding the jury’s consideration of evidence that Cail and Hardy alone, and not defendant, committed the robbery. The trial court did not err.

The trial court instructed the jury with CALJIC No. 2.11.5 as follows:

“There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, do not speculate or guess as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of each defendant on trial.” (CALJIC No. 2.11.5 (Fall 2007-2008 ed.).)

In *People v. Farmer* (1989) 47 Cal.3d 888, the California Supreme Court rejected defendant’s contention that CALJIC No. 2.11.5 impedes the defense that another person committed the offense with which the defendant is charged. (*Id.* at pp. 918-919 [decided under 1979 version of the instruction], disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)<sup>4</sup> The Supreme Court held that the instruction accurately stated the law and did not appear to be misleading. (*Id.* at p. 919.) The Supreme Court reasoned that “the instruction does not tell the jury it cannot consider evidence that someone else *committed* the crime. [Citation.] It merely says the jury is not to speculate on whether someone else might or might not be *prosecuted*.” (*Id.* at p. 918.)<sup>5</sup> Accordingly, the trial court did not err in instructing with CALJIC No. 2.11.5.

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<sup>4</sup> The 1979 version provided, “There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. [¶] You must not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted.” (CALJIC No. 2.11.5 (4th ed. 1979).)

<sup>5</sup> The Supreme Court stated that “the instruction would be more informative and might better deter speculation if it told the jury explicitly that its sole duty is to decide whether *this* defendant is guilty and that there are many reasons why someone who also appears to have been involved might not be a codefendant in this particular trial.” (*People v. Farmer, supra*, 47 Cal.3d at pp. 918-919.) These suggested additions were incorporated in the 1989 revision of the instruction that provided, “There has been evidence in this case indicating that a person other than defendant was or may have been

Moreover, it is not error to instruct the jury with CALJIC No. 2.11.5 when an unjoined perpetrator does not testify because the instruction is “fully applicable” to such defendants. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1055.) Accordingly, CALJIC No. 2.11.5 was appropriate as to Cail, defendant’s co-defendant for part of the trial who did not testify.

As to Hardy, the juvenile who testified for defendant, the use note to CALJIC No. 2.11.5 does state that the instruction is not to be given when an unjoined perpetrator of the same crime testifies for either side (see *People v. Fonseca* (2003) 105 Cal.App.4th 543, 547 [decided under the 1988 version of the instruction]) and “[a] number of cases have held that it is error to employ this instruction under those circumstances. (See, e.g., *People v. Lawley* (2002) 27 Cal.4th 102, 162-163, 115 Cal.Rptr.2d 614, 38 P.3d 461; *People v. Cain* (1995) 10 Cal.4th 1, 34-35, 40 Cal.Rptr.2d 481, 892 P.2d 1224.)” (*People v. Fonseca, supra*, 105 Cal.App.4th at pp. 547-548.) The express language of 2.11.5 makes clear, however, that the instruction did not apply to Hardy. CALJIC No. 2.11.5 told the jury that it was not to speculate about the reasons why a person other than the defendant who, as the evidence indicated, was involved in the crime was not being prosecuted in this trial or whether he has been or will be prosecuted. The jury was not left to speculate about Hardy’s prosecution. Hardy in his testimony suggested that he pleaded no contest to the robbery of Rivera in a proceeding in juvenile court and that he received six months in juvenile camp. This is how the parties interpreted the testimony. Thus, there was no error in giving the instruction. Moreover, Hardy testified in defendant’s trial that Hardy, and Cail, and not defendant, robbed Rivera. This testimony

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involved in the crime for which the defendant is on trial. [¶] There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether [he] [she] has been or will be prosecuted. Your [sole] duty is to decide whether the People have proved the guilt of the defendant[s] on trial.” (CALJIC No. 2.11.5 (5th ed. January 1995 Supplement).) These additions remained in the version of CALJIC No. 2.11.5 given to the jury in this case.

was beneficial to defendant. Thus, defendant was not prejudiced by the instruction because it could not have impeded the defense.

**DISPOSITION**

The judgment is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.